



## **BEFORE THE MONTGOMERY COUNTY ETHICS COMMISSION**

### **Waiver No. 05-04-005W**

Absent a waiver, a former public employee cannot work for a person or business on a “specific matter” for 10 years after the last date the employee “significantly participated” in that matter as a public employee. § 19A-13(a). Also, for one year after leaving County employment, a former employee must not enter into any employment agreement with any person or business if, during the prior three years, the employee significantly participated in any procurement or other contractual activity concerning a contract with that person or business. § 19A-13(b).

Charles Smith, a Healthcare Data Manager in the Aging and Disability Services Division of the Department of Health and Human Services, asks for an advisory opinion and a waiver, if needed, regarding his ability to seek post-County employment with a County contractor where he helps develop the underlying RFP (Request For Proposal). The Commission does not perceive any violation of § 19A-13(a) because working on a County contract (as post-County employment) is not the same “specific matter” as working on the underlying RFP as a County employee. Therefore, the Commission will waive the prohibitions of § 19A-13(b) so long as Mr. Smith’s significant participation in the procurement activity that led to the contract is limited to work on the RFP. A waiver will not be granted if Mr. Smith participates, in any way, in the contractor selection process for the resultant contract.

### **Facts**

Mr. Smith anticipates leaving his County job after he obtains his PhD in social work this May and is seeking work in the private sector in his area of specialization—gerontology and research methodology. Given his area of expertise, one of his current job duties is working on an RFP for a strategic plan to examine the needs of elders in the County. Mr. Smith notes that because of his area of specialization, the research organizations that respond to the RFP are likely to be the same organizations he would solicit for post-County employment.

### **§ 19A-13(a)**

The Commission does not perceive any violation of § 19A-13(a) should Mr. Smith work on the contract for the contract awardee because working on the County contract is not the same “specific matter” as the RFP Mr. Smith worked on as a County employee. Under § 19A-13(a), a former public employee cannot work for someone else on a “specific matter” for 10 years after the last date the employee “significantly participated” in that matter as a public employee. The

Commission has narrowly interpreted § 19A-13(a), given its proscription against working on the same “specific matter” and its relatively harsh 10-year prohibition. *See Advisory Opinion 03-015* (Apr. 8, 2003); *Advisory Opinion 03-016* (May 15, 2003). Thus, there is no violation of § 19A-13(a) should Mr. Smith work for someone else on a contract that arose out of an RFP he worked on as a County employee.

### **§ 19A-13(b)**

Absent a waiver, Mr. Smith cannot work for a contract awardee if he significantly participated in the development of the underlying RFP. Under § 19A-13(b), for one year after leaving County employment, a former County employee must not enter into any employment agreement with any person or business if, during the prior three years, the employee significantly participated in any procurement or other contractual activity concerning a contract with that person or business. Mr. Smith’s current work on the RFP constitutes significant participation in an activity defined by § 19A-(c). The issue is whether work on an RFP constitutes work “in any procurement or other contractual activity concerning a contract.” The Commission believes that it does.

The Commission concludes that work on an RFP constitutes work “in any procurement or other contractual activity concerning a contract” under § 19A-13(b). An RFP is the first step in the procurement process.<sup>1</sup> While a role in the contract process itself<sup>2</sup> would obviously constitute work “in any procurement or other contractual activity concerning a contract,” the Commission concludes that work on the underlying RFP also qualifies. Absent a waiver, § 19A-13(b) will serve to bar Mr. Smith from working for the contract awardee for one year after leaving County employment, if he works on the instant RFP.

The Commission believes that limiting Mr. Smith’s activity to working on the RFP only is an appropriate circumstance for a waiver. The Commission may waive the prohibitions of § 19A-13 if it finds that (1) failing to grant the waiver may reduce the ability of the County to hire or retain highly qualified public employees or (2) the proposed employment is not likely to create an actual conflict of interest. The Commission concludes the proposed employment with the contract awardee is not likely to create an actual conflict of interest with his County employment for several reasons: Mr. Smith does not know whether his department will issue the RFP once drafted, he does not know who might bid on the RFP, and he does not know the identity of the contract awardee and can play no role in the selection of the awardee (assuming the department makes a final award). In sum, the connection between Mr. Smith’s work on the RFP at one end of the spectrum, and the ultimate award of a contract at the other end of the spectrum, is so tenuous that it is unlikely to create an actual conflict of interest with his County employment. However, this waiver is valid only so long as Mr. Smith’s work on the contract is

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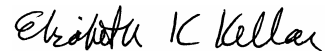
<sup>1</sup> Some procurements are solicited through the use of an IFB (Invitation For Bid) and others are exempt from the procurement process altogether.

<sup>2</sup> For example, by taking part in the selection process or signing off on the final award decision.

limited to drafting the RFP—this waiver is invalid if Mr. Smith significantly participates in any fashion in the award resulting from the RFP.

Finally, under § 19A-11(a)(2)(C), Mr. Smith cannot participate in any matter if he knows or reasonably should know that a party to that matter is any business with which he is negotiating or has any arrangement about prospective employment.

FOR THE COMMISSION:

A handwritten signature in black ink, appearing to read "Elizabeth K. Kellar".

Elizabeth K. Kellar, Chair

April 25, 2005

Date